



Federal Communications Commission
Washington, D.C. 20554

DA 04-1219
Released: April 30, 2004

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Commonwealth Public Broadcasting Corp.
23 Sesame Street
Richmond, VA 23235

Re: WCVE-TV, Richmond, VA
Facility ID: 9987
NAL/Acct. No. 0441420002
FRN-0006692347

Dear Licensee:

This letter constitutes a Forfeiture Order and addresses the response to the *Notice Of Apparent Liability For A Forfeiture (NAL)* issued against Commonwealth Public Broadcasting Corp. (“Commonwealth”), licensee of the above-captioned station, pursuant to Section 503(b) of the Communications Act of 1934, as amended (“Act”), for unauthorized construction and operation of WCVE-TV in violation of Section 73.1745 of the Commission’s Rules.

In the NAL, we found, as Commonwealth admitted, that it constructed and commenced operations with new facilities for WCVE-TV from at least November 2002 and continuing at least until April 15, 2003 without prior authority from the Commission and more than 90 days before an application for those facilities was even filed, in violation of Section 73.1745 of the Commission’s Rules. It was determined that Commonwealth should be sanctioned for its violation of the Commission’s Rules, and that a \$10,000 forfeiture was consistent with the Commission’s forfeiture guidelines and appropriate under these circumstances. *See Letter to Commonwealth Public Broadcasting Corp. from W. Kenneth Ferree, May 15, 2003*

In its response to the NAL, Commonwealth does not challenge the finding that it violated the Commission’s Rules, but argues that the forfeiture imposed “is difficult to justify” inasmuch as the violation in question was “inadvertent, minor in nature, and harmless to the public and other stations.” It maintains that the forfeiture is unduly harsh given its long history of good behavior and limited financial resources, and is inconsistent with other cases where smaller fines were imposed for more egregious conduct. It therefore submits that the forfeiture imposed is inappropriate and requests that it be cancelled.

Specifically, Commonwealth states that the forfeiture arises from its commencement of WCVE-TV’s operation from a newly constructed tower located 75 feet from the station’s licensed antenna structure. Because its old tower could not accommodate the DTV facilities of the three Richmond stations that shared that tower, Commonwealth intended to locate the WCVE-TV antenna on the new tower, owned and constructed by a third party. It states that two factors led to the incident at issue. First, Commonwealth asserts that its engineer assigned to the

project, including the preparation and filing of applications for FCC authorization, retired in June 2002 and distributed his files elsewhere in the licensee's offices "which assumed the engineering and licensing responsibilities associated with the construction." It states that its staff was less experienced with the project's details and "unfortunately lost sight of the need to obtain Commission authorization" before the station commenced service on the new tower.

Second, Commonwealth states that after the new tower structure was completed in August 2002, the remaining work, including construction of the transmitter building and the installation of transmission equipment for the stations involved, was assigned to subcontractors. It asserts that these subcontractors did not provide it with a work schedule, thereby impairing its ability to identify and prepare in advance for various stages of construction. When the station's analog transmission line was attached to the new tower on November 19, 2002, Commonwealth states that the subcontractors "came with short (and only verbal) notice" to it. When it did realize that WCVE-TV commenced operation without authority, Commonwealth states that it quickly moved to correct its oversight by filing the modification application for its new facilities on March 10, 2003, and by later filing a request for special temporary authority (STA) to operate with the facilities specified in the modification application.¹

Commonwealth acknowledges its errors, but argues that in light of its explanation, the forfeiture imposed is inconsistent with Commission precedent and more excessive than that assessed for more flagrant violations. In this regard, it argues that it received the baseline forfeiture of \$10,000 while other "contextually similar, yet far more flagrant" violations garnered smaller forfeiture amounts. Commonwealth notes that in "more egregious" cases, broadcasters were fined less for relocating its transmitting facilities farther from their authorized sites and operating there for longer periods of time. It also cites cases where the Commission imposed equal or lesser penalties for more serious violations that implicated public health and safety concerns, such as tower lighting and unenclosed tower site violations. Commonwealth argues that in this case, its failure to comply with construction permit obligations was inadvertent, resulted in no change of the station's coverage area, conferred no economic or competitive benefit to it, caused no interference to other stations, "and had absolutely no detrimental effect on anyone or anything." It therefore argues that its rule violation was relatively minor and innocuous and that its error was diligently corrected, yet its penalty was more severe than in those imposed in similar or worse cases.

Finally, Commonwealth argues that the forfeiture imposed is "especially harsh" given its excellent record as an FCC licensee and its strained financial condition as a non-profit, noncommercial broadcaster. In this regard, it has submitted financial statements and supplementary information that purport to show that Commonwealth, which serves its public through five full-power stations, translators and cable and satellite distribution, has experienced substantial operating deficits since 1998. It notes that federal and state grants, critical funding that has helped to sustain its stations, have been eliminated or reduced, with further reductions likely in the future. Moreover, Commonwealth states that it has traditionally relied on investment income from unrestricted capital reserves to fund routine capital requirements,

¹ Commonwealth disclosed its violation in the STA request it filed on March 31, 2003.

averaging \$1 million annually for its five stations, and depreciation, but that since 1998, it has been forced to use investment income to reduce operating deficits without funding depreciation.² As its revenues decline and deficits continue, Commonwealth states that it also must fund the digital conversion of its stations. For these reasons, Commonwealth requests that the \$10,000 forfeiture imposed against it be cancelled.

Discussion. The forfeiture amount in this case was assessed in accordance with Section 503(b) of the Communications Act of 1934, as amended,³ Section 1.80 of the Commission's Rules,⁴ and *Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules*, 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) (*Forfeiture Policy Statement*). As disclosed in the STA application, Commonwealth offered no explanation and presented no mitigating factors for its rule violation. Accordingly, the imposition of the baseline forfeiture was consistent with *Forfeiture Policy Statement* and our implementing rules.⁵ However, in examining Commonwealth's response to the *NAL*, Section 503(b) of the Act requires the Commission to take into account the nature, circumstances, extent and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other matters as justice may require.⁶

Based on our review of this case, we are not persuaded that the Commonwealth's explanation of how the subject violation occurred alone warrants cancellation of the forfeiture in its entirety. A licensee is charged with the responsibility of knowing and complying with all the requirements of the Act and the Commission's Rules.⁷ That responsibility is not lessened, mitigated or excused because Commonwealth mistakenly relied on its engineering staff or independent contractors.⁸ The Commission has long held that a licensee is ultimately responsible for the acts and omissions of its employees and independent contractors and has consistently refused to excuse licensees from forfeiture penalties when their actions have resulted

² Commonwealth adds that the collapse in equity markets has further reduced the value of its investments to half their worth in 2000.

³ 47 U.S.C. § 503(b).

⁴ 47 C.F.R. § 1.80.

⁵ We reject Commonwealth's assertion that the forfeiture imposed in this case was "excessive." The guidelines set forth in *Forfeiture Policy Statement* provide for a forfeiture of \$10,000 as the base amount for the construction and/or operation of a broadcast station without an instrument of authorization. Again, nothing contained in Commonwealth's submissions addressed mitigation of its violation or hardship. Thus, the imposition of the baseline forfeiture amount in this case was not unreasonable or unwarranted.

⁶ 47 U.S.C. § 503(b)(2)(D).

⁷ *Forfeiture Policy Statement*, 12 FCC Rcd at 17099.

⁸ See, e.g., *Eure Family Limited Partnership*, 17 FCC Rcd 21861, 21863-64 (2002); *MTD, Inc.*, 6 FCC Rcd 34, 35 (1991); and *Wagenvoord Broadcasting Co.*, 35 FCC 361, 361-62 (1972).

in violations.⁹ Commonwealth, as an experienced broadcaster and licensee of multiple broadcast stations, must be charged with knowing that it could not construct and begin operating WCVE-TV without prior FCC authority. Commonwealth cannot simply abrogate that responsibility as it attempts to do. Therefore, we find that no reduction of the forfeiture is warranted on this basis.

We also reject Commonwealth's argument that cancellation of the forfeiture is further warranted because, essentially, no harm resulted from its rule violation. It is irrelevant that there is no indication that the harms to be prevented by the rule did not actually occur, or that orderly broadcasting was compromised. There is an independent public interest obligation of licensees to comply with the rules, and it is the rule violation itself, and not the *potential* hazard or harm caused by the unauthorized operation, that is sufficiently serious to warrant the forfeiture.¹⁰

Commonwealth's argument that its "corrective action" merits reduction of the forfeiture imposed is similarly unavailing. In this case, Commonwealth filed its modification application for the facilities constructed almost four months *after* the fact. In addition, it filed its STA request for authority for WCVE-TV to operate at variance with its authorization and in accord with its proposed modified facilities *after* it constructed and commenced operation with those facilities. Moreover, it did not cease unauthorized operation until at least the April 15, 2003 denial of its STA request – some five months *after* the unauthorized construction. In this regard, it is apparent that, rather than discontinue its unauthorized operations, Commonwealth chose to file the necessary applications to "legitimize" its then-continuing violation of the rules. Further, without regard to whether the delay in filing applications (including STA for unauthorized facilities) constitutes expeditious corrective action, no mitigation of the forfeiture would be warranted on the basis that it ultimately corrected those violations. Corrective action taken to come into compliance with Commission rules or policies is expected, and does not nullify or mitigate any violations or forfeitures.¹¹

Although we find no basis to find the forfeiture imposed in this case to be "excessive," Commonwealth also contends that payment to the assessed forfeiture would result in an economic hardship to its continued operations. The Commission has determined that, in general, a licensee's combined gross revenues are the best indicator of its ability to pay a forfeiture.¹² Commonwealth has submitted Independent Auditors' Reports, dated August 24, 2001 and August 26, 2002, showing its financial position. After reviewing this financial data as submitted, we find no evidence to support outright cancellation or reduction of the forfeiture. Moreover, the

⁹ See, e.g., *KM Radio of St. Johns, L.L.C.*, FCC 04-69, § 10 (released March 25, 2004).

¹⁰ See, e.g., *AT&T Wireless Services, Inc.* 17 FCC Rcd 21866, 21871 (2002); *PJB Communications of Virginia, Inc.*, 5 FCC Rcd 6241 (1990), *app. for rev. denied*, 7 FCC Rcd 2088 (1992).

¹¹ *Id.* See also *Seawest Yacht Brokers*, 9 FCC Rcd 6099 (1994); *Radio Station KGVL, Inc.*, 42 FCC 2d 258, 259 (1973).

¹² See, e.g., *PJB Communications of Virginia, Inc.*, 7 FCC Rcd at 2089.

forfeiture imposed is not “excessive” when weighed against Commonwealth’s gross revenues.¹³ Nor has Commonwealth demonstrated that its ability to continue service to the public is jeopardized by payment of the forfeiture assessed. Commonwealth’s assertion that expected reductions in revenues is, without more, insufficient to support cancellation or reduction of the forfeiture on the grounds of economic hardship.¹⁴ Finally, as explicitly stated in the NAL and as set forth below, Commonwealth may submit a request for full payment of the forfeiture under an installment plan.

Based on our review of the facts and circumstances as set forth above, IT IS HEREBY ORDERED, That pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.283, and 1.80 of the Commission’s Rules, Commonwealth Public Broadcasting Corp.’s request to cancel the forfeiture imposed in the *NAL* IS DENIED.

IT IS FURTHER ORDERED That, pursuant to 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. §503(b), and Section 1.80(f)(4) of the Commission’s Rules, 47 C.F.R. §1.80(f)(4), Commonwealth Public Broadcasting Corp. IS LIABLE FOR A MONETARY FORFEITURE of ten thousand dollars (\$10,000) for willfully and repeatedly violating Section 73.1745 of the Commission’s Rules.

Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within 30 days of the release of this letter. If the forfeiture is not made within the specified period, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act. Payment may be made by mailing a check or similar instrument, payable to the order of the Federal Communications Commission, and addressed to the Forfeiture Collection Section, Finance Branch, Federal Communications Commission, and P.O. Box 73482, Chicago, Illinois, 60673-7482. The payment MUST INCLUDE the NAL/Account Number and the FCC Registration Number (FRN) referenced above. Requests for full payment under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street, S.W., Washington, D.C. 20554.¹⁵

FEDERAL COMMUNICATIONS COMMISSION

W. Kenneth Ferree
Chief, Media Bureau

cc: Richard J. Bodorff, Esquire

¹³ *Id.* See also *Hoosier Broadcasting Corporation*, 15 FCC Rcd 8640, 8641 (*EB 2002*). In this case, the forfeiture imposed is less than one percent of Commonwealth’s gross revenues.

¹⁴ *PJB Communications of Virginia, Inc.*, 7 FCC Rcd at 2089.

¹⁵ See 47 C.F.R. § 1.1914.